Supreme Court, U.S.
FILED

98 152 JUL 20 1998

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
October Term, 1998

Charles F. Hockenbarger,
Petitioner

vs.

State of Kansas

ON PETITION FOR WRIT OF CERTIORARI
TO THE KANSAS COURT OF APPEALS

APPENDIX TO:
PETITION FOR WRIT OF CERTIORARI

Margie J. Phelps
Counsel of Record
A SOLE PRACTITIONER
3734 S.W. 12th Street
Topeka, Kansas 66604
(785)273-7380

44 pp

APPENDIX TABLE OF CONTENTS

A. Order of the Kansas Court of Appeals dated February 20, 1998.

B. Order denying rehearing or modification of the Kansas Court of appeals dated March 19, 1998.

C. Order denying petition for review of the Kansas Supreme Court dated April 28, 1998.

D. Partial Transcript of hearing on motions to dismiss dated January 11, 1996.

A. ORDER OF THE KANSAS COURT OF APPEALS DATED FEBRUARY 20, 1998.

No. 76,317

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHARLES F. HOCKENBARGER,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; ROBERT J. SCHMISSEUR, judge. Opinion filed February 20, 1998. Affirmed.

Margie J. Phelps, of Topeka, and *Chris R. Davis*, of Phelps-Chartered, of Topeka, for appellant.

James A. Brown, assistant district attorney, *Joan M. Hamilton*, district attorney, and *Carla J. Stovall*, attorney general, for appellee.

Before BRAZIL, C.J., GREEN,J., and D. KEITH ANDERSON, District Judge, assigned.

Per Curiam: This is an appeal by Charles F. Hockenbarger from a conviction by a jury of battery and criminal restraint. On appeal, Hockenbarger raises a number of issues, including lack of a speedy trial, selective prosecution, insufficient evidence, and abuse of discretion at sentencing. We disagree and affirm.

Hockenbarger is a member of the Westboro Baptist Church (WBC). Along with other members of WBC, Hockenbarger participates in anti-homosexual picketing of various public and private

establishments, including churches. William G. Weeks is the pastor of First Lutheran Church in Topeka. On Sunday, September 5, 1993, Hockenbarger and several other WBC members picketed the outdoor morning worship services of the First Lutheran Church. In response to this picketing, Weeks went with a hammer and his own sign to where the picketers were congregated along the public sidewalk in front of the church property. There, a conflict between Weeks and the picketers developed.

In a complaint filed October 7, 1993, Hockenbarger was charged with one count of battery and one count of unlawful restraint against Weeks. Three other WBC picketers who were involved in the dispute were also charged in the same complaint.

Even though a clear understanding of the

facts has been made difficult because of Hockenbarger's failure to furnish a complete record of the transcript, we now turn our attention to the facts in this case.

While standing a few feet in front of the picketers who were lined up along the public sidewalk with their picket signs singing a hymn, Weeks hammered a sign in to the church property. After situating the sign and with the hammer in his hand, Weeks walked off to his right, moving closer to the sidewalk as he went. Weeks testified that he told the picketers they were disturbing the worship service and that the church would call the police if the picketers came onto its property. Weeks testified that when he first arrived with the sign somebody yelled out to him, "'fag,'" and that after he had finished hammering the sign into the ground, someone called him a "'butt-fucking sodomite.'"

Bryce Cripps, a member of Weeks' congregation, testified that, after Weeks hammered the sign into the ground, Weeks walked over to the sidewalk near the exit lane leading from the church lot, bent down, and hit the ground in front of the sidewalk with the hammer near where the picketers were standing. Cripps testified that some women picketers seemed to be closest to Weeks. Cripps, who had been viewing this from a distance, started walking toward Weeks because a confrontation seemed to be developing and he wanted to get Weeks out of the situation. Weeks then started walking back parallel to the sidewalk; after Weeks took a couple of steps, Cripps saw him make a half-swing with the hammer, walk some more, and then pause. The rest of Cripps' testimony is not provided.

Elizabeth Phelps testified she and her sister, Margie Phelps, were standing on the sidewalk next

to George Stutzman and several others singing a hymn when Weeks, after hammering the sign into the ground, walked across the grass in their direction and started telling them to leave and to get off his property. Weeks then took the hammer and swung it near Margie's feet three times. The third blow struck the side of Margie's right shoe in the toe area, causing her to pull back and scream. Elizabeth said that Stutzman told Weeks to quit swinging the hammer, and Weeks responded by swinging it toward Stutzman, striking him with the handle of the hammer. Stutzman again told Weeks to stop it and Weeks swung again. The second swing missed Stutzman but caused the hammer head to fly off the handle. When Elizabeth looked in the direction where the hammer went, she saw Benjamin Phelps holding his chest as though he had been hit. Elizabeth said she ran across the street and called the police.

Officer Phillip Martin, who was one of the officers called to the scene, testified that Weeks demonstrated to the investigating officers how he hit the ground with the hammer near the feet of the picketers. Weeks indicated to Martin that he was upset that some of the picketers had their feet on church property.

Timothy Phelps, one of the defendants in the case, testified that he too saw Weeks bend over and hit the hammer on the ground near the picketers' feet, hitting Margie. He also saw Weeks swing the hammer twice at Stutzman.

Hockenbarger testified that he had been across the street putting away a picket sign when he heard a woman scream. When he ran over to investigate, he saw Weeks walking on the grass holding a hammer handle. Video footage shows that after a few

yards, Weeks moved onto the sidewalk and attempted to cross the line of picketers. The picketers, including Hockenbarger, would not let him pass. Jonathan Phelps snatched the hammer handle from Weeks' hand and told Weeks that he would not be hitting anyone else with the hammer. Weeks protested that he had only been hammering something into the ground, and Jonathan responded by calling him a liar.

Calling Weeks a "so-called priest" and other derogatory names, Margie Phelps asked Weeks for his name and informed him she was going to report him to the police for hitting three people, herself, George Stutzman, and Benjamin Phelps, with a hammer. Weeks looked down and, apparently believing someone was standing on church property, called out to a member of his congregation, directing her to call the police because the picketers were trespassing.

When Weeks persisted in attempting to cross the line of picketers toward the direction of the street, the picketers refused to let him pass. Weeks appeared surrounded. Hockenbarger then told Weeks that he was not going anywhere because he was under citizen's arrest, and some pushing and struggling occurred. Hockenbarger, Timothy Phelps, and several others, forced Weeks down to the ground where he was held down, chest to the ground, by Karl Hockenbarger, James Phelps, and, to a lesser extent, Hockenbarger.

Both Hockenbarger and Timothy Phelps testified that Weeks grabbed Hockenbarger by each wrist while he was standing among the picketers on the sidewalk. Hockenbarger said that at that point he felt he was being attacked and decided to perform a citizen's arrest. Hockenbarger testified that prior to that, he did

not really have information which would warrant keeping Weeks there; he had heard Margie's report of what happened but had not actually seen any attack by Weeks. Hockenbarger said that he and others managed to break Weeks' grip on his wrists and that he placed his arm around Weeks' neck and then released him. Hockenbarger and Timothy Phelps said that Weeks kneed Hockenbarger in the groin before being taken down to the ground. Neither Weeks' grabbing of Hockenbarger's wrists nor Weeks' kneeing him in the groin can be confirmed by the videotape due to positioning of the camera and participants.

The jury acquitted all the defendants except Hockenbarger, who was convicted on both accounts.

SPEEDY TRIAL

A. Statutory Right to a Speedy Trial.

K.S.A. 22-3402(2) provides that any person charged with a crime and held to answer on an appearance bond shall be brought to trial within 180 days after arraignment and shall be released from risk of conviction under the charge if the time limit is exceeded, unless the delay is due to the "application or fault of the defendant" or due to a continuance granted under K.S.A. 22-3402(3). No continuances were granted in this case. Hockenbarger argues that he was not brought to trial within the 180-day time limit, and he filed a motion to that effect on December 27, 1995, seeking dismissal on constitutional and statutory speedy trial grounds. Hockenbarger bases his statutory argument on the concept of a constructive arraignment, which he alleges occurred in this case on November 29, 1993, when notice

of a trial date was given.

K.S.A. 22-3205 provides:

> "(a) Arraignment shall be conducted in open court and shall consist of reading the complaint, information or indictment to the defendant or stating to the defendant the substance of the charge and calling upon the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before the defendant is called upon to plead....[I]f the crime charged is . . . a misdemeanor, with the approval of the court, the defendant may appear by counsel."

The complaint and affidavit against Hockenbarger were filed on October 7, 1993. After being arrested, he posted bond on October 12, 1993. Elizabeth Phelps filed a written appearance as counsel for Hockenbarger on the same day and filed a written request for a jury trial on October 14, 1993. On

November 29, 1993, a notice was sent scheduling the trial for February 2, 1994. Although Hockenbarger's brief refers to both November 22 and November 29, 1993, as the day notice of the trial date was set, November 29, 1993, seems to be the correct date based on remarks to the trial court and based on the appearance docket, which shows November 29 as the date notice was sent.

Hockenbarger's counsel testified that no motion for change of venue was filed in this case, but that motions to change venue were filed in other Phelps-related cases. The motions referred to are not in the record, nor does the record contain a motion to change venue in this case. Hockenbarger's counsel testified that the motion was argued December 8, 1993, at which time the judge was informed by defense counsel that the change could also be considered effective for the

defendants in this case. In a journal entry dated and filed December 20, 1993, the judge also granted what it termed as defendant's motion for change of venue in this case. A certification of venue to Lyon County was filed with the Kansas Supreme Court on December 22, 1993.

On January 4, 1994, the United States District Court for the District of Kansas issued an order of stay so that a federal complaint regarding the case could be resolved. The stay was lifted in an order dated and filed July 27, 1995.

On December 15, 1995, the Kansas Supreme Court filed an order transferring venue to Douglas County. It is not clear from the record if this additional transfer caused delay.

Hockenbarger's motion to dismiss for lack

of a speedy trial was heard and denied on January 11, 1996. At that time, the district court found that no arraignment had occurred in the case. Hockenbarger contends that, for all practical purposes, the requirements of arraignment were satisfied November 29, 1993, when notice was sent setting a trial date in response to Hockenbarger's written request for a trial. Using Hockenbarger's constructive arraignment date of November 29, 1993, Hockenbarger was brought to trial 6 days too late. However, using the formal arraignment date of January 12, 1996, there would be no statutory problem at all.

Hockenbarger asserts that his request for a jury trial acted as a waiver of arraignment not only effective against him, but also effective against the State for speedy trial purposes. Hockenbarger argues that arraignment was constructively satisfied by November 29,

1993, because he had a copy of the complaint, his counsel had filed an entry of appearance, and he had made it clear that he was pleading not guilty by requesting a jury trial.

The Kansas arraignment statute has been strictly construed to require fulfillment of each statutory element before arraignment is deemed to have occurred for speedy trial purposes. See, *e.g., State v Smith,* 247 Kan. 455, 458-60, 799 P.2d 497 (1990)(arraignment had not occurred where neither defendant nor counsel appeared before the court to enter a plea and the complaint had not been filed); *State v. Rosine*, 233 Kan. 633, 669, 664 P.2d 852 (1983)(no arraignment where no complaint had been filed).

Arraignment in a criminal proceeding is a *formal* act and is to be conducted in *open court* either by

the defendant personally or, in misdemeanor cases, by either the defendant or, upon leave of court, by counsel. K.S.A. 22-3205(a); *Rosine*, 233 Kan. 633, Syl. ¶ 3. The only time a *formal* arraignment was conducted in *open court* in this case was on January 12, 1996, the date of trial. Using this date, there was no violation of the statutory right to a speedy trial.

B. *Constitutional Right to a Speedy Trial*

Hockenbarger also argues that if the only arraignment recognized by this court occurred on January 12, 1996, then his constitutional right to a speedy arraignment was violated. There is no constitutional right to a speedy arraignment per se, and there is no statutory time limit on arraignment in misdemeanor cases.

As a result, Hockenbarger is left with only a constitutional speedy trial claim. In *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed.2d 101, 92 S. Ct. 2182 (1972), the United States Supreme Court set out a four-part balancing test to be applied on a case-by-case basis: (1) length of the delay; (2) the reason for the delay; (3) whether defendant asserted his or her right to be brought to trial speedily; and (4) prejudice to the defendant. The length of the delay is a triggering mechanism--until there is some delay giving concern as to prejudice, there is no need to inquire into the other three factors. See *State v. Smith*, 247 Kan. at 459-60.

The delay in this case, between charging and trial, was roughly 2 years and 3 months. Nevertheless, the evidence showing a speedy trial violation is woefully lacking. First, roughly a year and a half of the delay is attributable to Hockenbarger because

of the motion for change of venue and the stay which was ordered to resolve a federal case brought by Hockenbarger and others to enjoin their prosecution. See *Phelps v. Hamilton*, 840 F.Supp. 1442 (D.Kan. 1993). Second, there are no allegations and there is no evidence that the portion of the delay attributable to the State was deliberate. In addition, we note that the State was originally ready for trial in February 1994, but the entry of the stay required this trial date to be canceled.

Hockenbarger did not assert his speedy trial right until several months after the stay was lifted. Moreover, Hockenbarger argued unsuccessfully in federal court that the lifting of the stay was an abuse of discretion. *Phelps v. Hamilton*, 122 F.3d 1309, 1324-25 (10th Cir. 1997).

Finally, there is no indication from the

available record that Hockenbarger's ability to defend his case was prejudiced by the wait. There is no indication that witnesses or evidence were lost or that memories faded, and the videotape was available to refresh memory for at least part of the events of September 5, 1993. There is also no evidence that the State gained a tactical advantage from the delay. See *State v. Wilson*, 227 Kan. 619, 624-25, 608 P.2d 1344 (1980)(discussing some possible claims of prejudice). When all of the above factors are balanced, Hockenbarger has failed to show a violation of his constitutional right to a speedy trial.

JURY INSTRUCTIONS

Hockenbarger takes exception to two jury instructions: Instruction 25, mistakenly referred to as number 24 by Hockenbarger, and Instruction 28.

Instruction 25

Instruction 25 states: "You are instructed that every person has a right to resist an unreasonable citizen's arrest and a person may use such reasonable force as is necessary to prevent the arrest." Although the State asserts that Hockenbarger failed to object to this instruction prior to the jury retiring to consider its verdict, it is clear from Hockenbarger's counsel's statements at the instruction conference that he was objecting to the instruction as not being a fair statement of the law.

If jury instructions fairly and properly state the law as applied to the facts of the case, and if the jury could not reasonably have been misled by the content of the instructions, then reversible error will not arise from the instructions even though they may be erroneous in some small way. *State v. Aikins*, 261 Kan. 346, Syl. ¶ 25,

932 P.2d 408 (1997). Hockenbarger asserts that Instruction 25 misstates the law. Hockenbarger relies on K.S.A. 21-3217, which states:

> "A person is not authorized to use force to resist an arrest which he knows is being made either by a law enforcement officer or by a private person summoned and directed by a law enforcement officer to make the arrest, even if the person arrested believes that the arrest is unlawful."

Hockenbarger interprets K.S.A. 21-3217 as prohibiting resistance of any citizen's arrest, regardless of whether the citizen's arrest is performed at the direction of a law enforcement officer. Hockenbarger cites *State v. Miller*, 257 Kan. 844, 849, 896 P.2d 1069 (1995), and *State v. Franz*, 9 Kan.App.2d 319, 320, 676 P.2d 157 (1984), as support for this interpretation; however, these cases are easily distinguishable. *Miller*

simply holds that an officer conducting an arrest outside of his jurisdiction is generally treated as a private person conducting a citizen's arrest. 257 Kan. 844, Syl. ¶ 1. Resistance of the arrestee was not part of the facts of that case. *Franz* involved a suspect resisting arrest by a law enforcement officer. This court noted that there is no right to resist such an arrest, even if it is lawful. 9 Kan.App.2d at 320. There is no indication in *Franz* that the officer was operating outside his jurisdiction or that he was otherwise to be viewed as a private citizen.

Interpretation of a statute is a question of law over which this court exercises unlimited review. *State v. Arculeo*, 261 Kan. 286, Syl. ¶ 1, 933 P.2d 122 (1997). The mention or inclusion of one thing in a statute generally implies the intent to exclude another. *State v. Luginbill*, 223 Kan. 15, 20, 574 P.2d 140 (1977). By specifically mentioning the circumstances where a

person is not authorized to resist what he or she believes to be an unlawful arrest, the legislature implicitly intended to exclude other circumstances from the rule. If the legislature had wanted to prohibit resistance to *all* unlawful citizen's arrests, it would have said so. Hockenbarger cites no statute or case law in Kansas which prohibits resistance to an unlawful citizen's arrest when the arrest is performed without police direction or supervision. As a result, the instruction does not misstate the law applicable to the situation in this case.

Hockenbarger says, in passing, that the use of words "unreasonable citizen's arrest" instead of "unlawful citizen's arrest" in the jury instruction compounded the asserted error. Hockenbarger does not say in what way the jury was misled, and, having attacked the instruction by arguing that a person may not resist an *unlawful* citizen's arrest, Hockenbarger himself seems to

have interpreted the instruction as referring to an unlawful citizen's arrest. While the words "unreasonable" and "unlawful" are certainly not interchangeable in every case, in this case, the use of the word unreasonable could not have misled the jury to Hockenbarger's prejudice.

Instruction 28

Hockenbarger also alleges error from the giving of Instruction 28, which states:

> "A person is not permitted to provoke an attack on himself or another person with the specific intention to use such attack as a justification for committing a crime upon the person he provoked and then claim self-defense as a justification for committing a crime upon the person he provoked."

This instruction is a slightly modified version of PIK Crim. 3d 54.21. At the instruction conference, Hockenbarger told the trial court that if the instruction was given, then he also wanted an instruction which made clear to the jury that mere words are not provocation; there must be something more to either incite a reasonable person to attack or to place a reasonable person in fear of imminent attack. The trial court gave an additional instruction that words alone, no matter how insulting or contemptuous, may not serve as justifiable provocation without circumstances causing a reasonable person to believe that he or another person was in imminent danger of attack. This instruction adequately responded to Hockenbarger's only objection to the provocation instruction.

SUFFICIENCY OF THE EVIDENCE

Hockenbarger argues that there was insufficient evidence to find him guilty beyond a reasonable doubt. When a criminal defendant challenges the sufficiency of the evidence, the appellate court reviews all the evidence, viewed it in the light most favorable to the prosecution, and determines whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Knighten*, 260 Kan. 47, Syl. ¶ 1, 917 P.2d 1324 (1996).

Although Hockenbarger has failed to provide a full record of the trial, he attempts to remedy this deficiency by repeatedly referring to evidence and alleged facts not contained in the record on appeal. An appellant has a duty to provide a complete record of all matters upon which review is sought and error claimed. *State v. Cady*, 254 Kan. 393, 400, 867 P.2d 270 (1994). Assertions in a brief will not remedy an inadequacy in

the record. *Smith v. Printup*, 254 Kan. 315, 353, 866 P.2d 985 (1993).

Hockenbarger also argues that the acquittals of the other defendants require reversal of his conviction because, he asserts, the evidence with regard to all was the same. It has long been recognized in this state that there need not be rational consistency between the verdicts of two or more defendants tried together. *State v. Sully*, 219 Kan. 222, 229, 547 P.2d 344 (1976). Therefore, even if a more adequate record could support his assertions that the evidence with regard to all of the defendants was the same, his argument fails.

ARGUMENT AND REMARKS

Hockenbarger argues that the jury was prejudiced by improper argument and remarks made by

the prosecutor and her witnesses "[t]hroughout the trial" regarding his religious beliefs and picketing activities. Hockenbarger's argument does not state exactly what remarks he considered objectionable and does not cite to any portion of the record where the alleged objectionable statements were made, let alone to where contemporaneous objections were interposed to preserve the issue for appeal. As a result, we will not address this issue.

EXCLUSION OF EVIDENCE

Hockenbarger argues that the trial court causes reversible error by refusing to allow Elizabeth Phelps to testify regarding an alleged prior incident involving Weeks on July 16, 1993. After the prosecutor objected to Elizabeth Phelps being questioned about the incident based on relevancy, defense counsel proffered

that the testimony would be that Weeks drove his car toward a picketer. Hockenbarger asserted the testimony was relevant to show Weeks' state of mind and to show prior misconduct directed at a picketing event.

The trial court responded that the evidence was not proper coming from Elizabeth Phelps to show Weeks' state of mind because Weeks had not been convicted of a crime and the testimony would consist merely of allegations. When asked if he disagreed with the trial court's assessment of the law on that point, defense counsel responded that he did not disagree.

Defense counsel then stated that the evidence was nevertheless relevant to impeach Weeks' testimony that he had not had prior dealings with the picketers. However, when the trial court and the parties examined the record of Weeks' testimony they

discovered no such assertion by Weeks. Weeks had simply said that his congregation had not experienced the picketers there at the church on any prior occasion.

There was no error upon which reversal can be predicated in this case. Defense counsel agreed that the evidence was not admissible with regard to Weeks' state of mind and thus failed to preserve the right to argue that point on appeal. As for use of the testimony for impeachment purposes, there was nothing to impeach. Even if the trial court had erred, errors in the exclusion of evidence which do not affirmatively prejudice the substantial rights of the complaining party to do require reversal. K.S.A. 60-261; *State v. Lolar*, 259 Kan. 682, Syl. ¶ 2, 914 P.2d 950 (1996).

MULTIPLICITY

Hockenbarger argues that his convictions for criminal restraint and battery were multiplicitous. Hockenbarger notes that, prior to participating in taking Weeks down to the ground and holding him there, he placed his arm around Weeks' neck for a few seconds and then released it. Hockenbarger assumes this is the only basis on which the jury might have concluded he committed two separate crimes, and he argues that his actions were not enough to constitute two separate offenses.

"Multiplicity is the charging of two or more counts in a complaint where only a single criminal offense is involved." *State v. Fritz*, 261 Kan. 294, Syl. ¶ 3, 933 P.2d 126 (1977). Hockenbarger relies on *State v. McClanahan*, 251 Kan. 533, 836 P.2d 1164 (1992), to argue that the acts supporting each charge were done pursuant to a single impulse--to effect a citizen's arrest--

and that he could not, therefore, be convicted of separate crimes. Hockenbarger's reliance on *McClanahan* is misplaced.

As stated in *Fritz*, "[t]he test to determine whether the charges in a complaint or information are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous." 261 Kan. 294, Syl. ¶ 4.

Applying this test to the present case, we determine that the convictions are not multiplicitous. In order to prove criminal restraint, the State had to prove that Hockenbarger knowingly, and without legal authority, restrained Weeks so as to interfere substantially with Weeks' liberty. See K.S.A. 21-3424(a). To prove battery, the State had to prove that

Hockenbarger intentionally caused physical contact with Weeks in a rude, insulting, or angry manner. See K.S.A. 21-3412(b). Criminal restraint requires substantial interference with the victim's liberty, while battery requires no such interference. Battery requires physical contact in a rude, insulting, or angry manner, while criminal restraint does not require any touching. Each offense requires proof of an element not required by the other offense. As a result, the charges were not multiplicitous.

SELECTIVE PROSECUTION

It has long been recognized that decisions regarding who and when to prosecute are within the sound discretion of the prosecutor. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 528, 646 P.2d 1091 (1982). However, this discretion is not boundless and must not

be used to unfairly discriminate or to punish individuals for the exercise of protected rights. 231 Kan. at 529. Where this precept is violated, it can be a valid defense to a criminal charge. 231 Kan. at 528. A defendant claiming selective or discriminatory prosecution must establish: (1) that others "similarly situated are not generally prosecuted for conduct similar to that for which defendant is being prosecuted" and (2) that the defendant "has been intentionally and purposefully singled out for prosecution on the basis of an arbitrary or invidious criterion [citation omitted]" such as religion, race or exercise of a constitutional right. 231 Kan. at 528.

Test Part One: Selective Charging

To support his claim that others similarly situated are not prosecuted, Hockenbarger offered the

testimony of WBC members who described several occasions of conflict between WBC picketers and non-WBC individuals where, he contends, WBC members were prosecuted but others who have attacked and victimized the WBC picketers have not been prosecuted.

Test Part Two: Improper Motive

As evidence that his group is being prosecuted for improper motives, particularly Hamilton's dislike of them and Hamilton's desire to squelch their freedom of expression and religion, Hockenbarger offered numerous anecdotes and documents which, he asserts, reveal Hamilton's strong disagreement with their anti-homosexual message and her intention to prevent them from or punish them for continuing with their constitutionally protected picketing activities.

Nevertheless, after reviewing the evidence, we conclude that Hockenbarger has failed to meet the first prong of the test, that is, whether others similarly situated are generally not prosecuted for the same illegal activity. As a result, Hockenbarger's argument fails.

DISQUALIFICATION OF A PROSECUTING ATTORNEY

Hockenbarger argues that the trial court erred in failing to disqualify the district attorney. The question of whether there is a conflict of interest or appearance of impropriety which justifies disqualification of a prosecuting attorney lies within the discretion of the trial court. *State v. Goodnow*, 12 Kan.App.2d 294, 299-300, 740 P.2d 113, *rev. denied* 242 Kan. 904 (1987). In this case, it was clear that Hamilton and the WBC picketers shared a mutual and public hostility toward

each other. Even so, Hockenbarger was required to show actual prejudice to his right to a fair trial. Because Hockenbarger has failed to furnish a sufficient record to determine whether actual prejudice occurred, his argument fails.

SENTENCING

Hockenbarger argues that the restriction on his picketing as a condition of probation was an abuse of discretion because it imposed a prior restraint on lawful religious activity without reasonable justification. A sentencing court has broad discretion in setting conditions of probation. *State v. Evans*, 14 Kan.App.2d 591, 592, 796 P.2d 178 (1990). Probation conditions which restrict certain religious activities are not necessarily improper. 14 Kan.App.2d at 593. Where probation conditions restrict constitutional rights, the

restrictions must bear a reasonable relationship to the goals of rehabilitation, protection of the public, and the nature of the offense. 14 Kan.App.2d at 592.

The restrictions in this case bear a reasonable relationship to the above goals and are not oppressive. Hockenbarger is not prohibited from engaging in all religious picketing, only from picketing in the few places where he is sure to come into the close vicinity of the victim or the State's witnesses. Considering that Hockenbarger's picketing was the catalyst for the confrontation in this case, we determine that the restriction is carefully tailored to avoid future similar confrontations between Hockenbarger, Weeks, and a few others closely related to the case. For this reason, the trial court did not abuse its discretion.

PROSECUTOR'S REMARKS

Hockenbarger argues that the sentencing process was tainted by prejudicial remarks made by the prosecutor at the sentencing hearing. At the sentencing hearing, the prosecutor explained that she had notified Weeks of his right to be present at sentencing, but that Weeks opted not to come because Weeks had received a letter from Hockenbarger's father. The prosecutor explained that Weeks also decided not to provide the trial court with a written statement because his church's attorney and insurance carrier advised him against making any statements. Hockenbarger argues that these remarks were improper and unsupported hearsay. He asserts that they prejudiced the sentencing process.

There was no objection to the remarks at sentencing, and, in any case, there is no indication from the trial court's comments or from the sentence that the trial court was in any way prejudiced against

Hockenbarger due to the prosecutor's statements. Absent a showing of prejudice, this issue does not require setting aside the sentence. See *Cabral v. State*, 19 Kan.App.2d 456, 464-65, 871 P.2d 1285, *rev. denied* 255 Kan. 1000 (1994).

Affirmed.

B. ORDER DENYING REHEARING OR MODIFICATION OF THE KANSAS COURT OF APPEALS DATED MARCH 19, 1998.

COURT OF APPEALS ORDER
DISTRICT CASE NO. 93CR2834

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

CHRIS R DAVIS
PHELPS CHARTERED
1414 S TOPEKA BLVD
P O BOX 1886
TOPEKA KS 66601-1886

STATE OF KANSAS, APPELLEE,
v. NO. 96-76317-AS
CHARLES HOCKENBARGER, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY CHARLES HOCKENBARGER.
CONSIDERED BY THE COURT AND DENIED.

DATE: 03/19/98.

CAROL G. GREEN
CLERK

C. ORDER DENYING PETITION FOR REVIEW OF THE KANSAS SUPREME COURT DATED APRIL 28, 1998.

SUPREME COURT ORDER
DISTRICT CASE NO. 93CR2834

IN THE SUPREME COURT

OF THE STATE OF KANSAS

CHRIS R DAVIS
PHELPS CHARTERED
1414 S TOPEKA BLVD
P O BOX 1886
TOPEKA KS 66601-1886

STATE OF KANSAS, APPELLEE
v. NO. 96-76317-AS
CHARLES HOCKENBARGER, APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY CHARLES HOCKENBARGER.
CONSIDERED BY THE COURT AND DENIED.

DATE: 04/28/98.

CAROL G. GREEN
CLERK

D. PARTIAL TRANSCRIPT OF HEARING ON MOTIONS TO DISMISS DATED JANUARY 11, 1996.

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

STATE OF KANSAS,	)
Plaintiff	)
	)
Vs.	)Case No. 93-CR-2834
	)
CHARLES F. HOCKENBARGER,	)
Defendant.	)

VOLUME I
TRANSCRIPT
OF
MOTION TO DISMISS; IN RE: SPEEDY TRIAL
MOTION TO DISMISS; IN RE: PROSECUTORIAL BIAS OR SELECTIVE PROSECUTION
MOTION TO SEVER; IN RE: MARGIE PHELPS
MOTION TO QUASH SUBPOENA DUCES TECUM; IN RE: CHRIS DAVIS
MOTION TO QUASH SUBPOENA; IN RE: GEORGE STUTZMAN
MOTION IN LIMINE
STATE'S MOTION TO ENDORSE ADDITIONAL WITNESSES
FORMAL ARRAIGNMENT: IN RE: MARGIE PHELPS

Hearing date: January 11, 1996.

* * *

(Pg. 17)

* * *

MR. DAVIS:

* * *

In this case, the complaint and affidavit were filed and the defendants had a copy of it. Further, Your Honor, they were scheduled to appear on December -- or -- I mean -- excuse me -- October 21, of 1993; and that was the reason. Because they were scheduled to appear on that, that was the reason for filing the demand for jury trial, was to forego that. They didn't need to appear if they'd already requested a jury trial. That means they pled. They had their affidavit and complaint. There's no need for them to appear, and they did not appear on that date; and it is the practice in Shawnee County that if you have demanded a jury trial prior to the first appearance, then you don't appear on the first appearance date, which is the date that the -- a plea would have been taken.

THE COURT: One of the dangers of local custom is that, sometimes, we get so wrapped up in local custom we may forget the -- what the statute says, what the Constitution says, what the appellate authorities say.

* * *

(Pg. 20)

MR. DAVIS: Just a moment, sir. As for local custom, Your Honor, these defendants, I'm sure you're aware, they are bound by whatever that local custom is.

THE COURT: The problem is, I don't know what the local custom is.

* * *

(Pg. 22)

MS. HAMILTON:

* * *

(Pg. 24)

The case was filed on October 7th. At the time that a bond is posed, it is true that the defendants, at that time, are given an

appearance date to appear at a docket; and that appearance docket, if you look on the warrant, or, the bond, because the State doesn't have a copy of it, and I'm hoping it's in the file, was set for October 21st. A docket was to be called; and in Shawnee County, again, with misdemeanors, the defendants don't have to appear if counsel appear for them and waive the appearance, but that is the first appearance, or, quote, "arraignment," of the defendants.

* * *

(Pg. 179)

THE COURT: Thank you. The request to disqualify or to dismiss, to disqualify and for other appropriate relief is denied with this one comment: There was a -- The third request was that there be no harassing or intimidating or etcetera. I don't intend for anybody to do any harassing or intimidating.

As I commented earlier, I can think of several times in front of the jury that I have admonished counsel, parties of family members, or others if I thought their conduct was inappropriate. I can think of one time that the sheriff of Stafford County, Kansas, in

my opinion, was signaling answers to a deputy, and in front of the jury, I admonished him that that was inappropriate, and directed that he leave the courtroom.

I can think of a time in a medical malpractice jury trial where I, in front of a jury, admonished a lawyer that his conduct was inappropriate in putting his head down on the table when the other lawyer would start to make arguments and matter of that nature.

I don't intend for anybody to harass or intimidate, and if somebody thinks there's some of that going on, -- I've only got two eyes and two ears -- you bring it to my attention privately, rather than publicly, and I will sure attempt to deal with it.

I don't consider this matter as resolved merely because it's been reviewed, the same issue, by three or four other different courts. I would agree with some of the commentary in the opinions that political speech during a political campaign is probably as strongly protected speech as we have in this country, and that political speech has always received special treatment of -- of all

different types of public expression.

The Court is satisfied that, while there may be some very sincere and strong difference of opinion as to whether or not Miss Hamilton properly exercises her discretion in this matter, the fact that her office has prosecuted people who have committed crimes against members of the Westboro Baptist Church or the Phelps family, that there have been, apparently, multiple occasions that they have declined – the Shawnee County District Attorney's office has declined to prosecute members of Westboro Baptist Church or the Phelps family when requested to do so, is a prima facia showing that there's nothing inappropriate. The matter will be resolved on the facts and evidence of this case, and I -- I will try to pay particular attention that there's no insertion of any personal matters by counsel in this case.

* * *